

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM DOUGLAS HANING,

Defendant.

No. 4:18-CR-00139-RWS-NAB

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT, OR IN THE ALTERNATIVE,
MOTION TO DISQUALIFY PROSECUTION TEAM**

The United States of America, by undersigned counsel, respectfully asks this Court to deny Defendant William Douglas Haning's Motion to Dismiss Indictment, or in the Alternative, Motion to Disqualify Prosecution Team (D.E. 72).

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, President Donald J. Trump appointed Sessions' Chief of Staff, Matthew G. Whitaker, to serve temporarily as Acting Attorney General under the Federal Vacancies Reform Act (FVRA). The appointment of Whitaker as the Acting Attorney General is the precipitating event for the filing of the motion to dismiss. However, as explained below, Whitaker's November 2018 appointment as the Acting Attorney General (a) does not provide a basis for dismissal of the indictment which has been pending against Haning since February 2018, and (b) is irrelevant to the question of whether attorneys designated as Special Attorneys to the Attorney General since November 2017 may serve, and continue to serve, as attorneys on the team assigned to this prosecution.

Procedural Background

This case sits at the intersection of multiple related civil and criminal proceedings in this district. It is important to recall and set forth the relevant history from those civil and criminal proceedings, both for the sake of establishing a clear record and as a preface to considering the merits of the legal claims presented in the pending defense motion.

In May 2014, Nestle Purina PetCare Company filed a civil complaint naming Blue Buffalo Company, Ltd. as the defendant, alleging that Blue Buffalo knowingly and fraudulently misled consumers about the ingredients in the pet food manufactured by Blue Buffalo. *See generally* EDMO Case No. 14-00859.

As the case developed through discovery, in June 2015 Blue Buffalo brought Wilbur Ellis Company and Diversified Ingredients, Inc., into the litigation as third-party defendants. (D.E. 333, Status Conference Agenda). Later still, Diversified Ingredients, Inc., as a third-party plaintiff, named Custom Ag Commodities, William Douglas Haning, and Henry R. Rychlik, Jr., as third party defendants. (D.E. 442, September 2015.)

Public knowledge of the facts underlying this developing civil litigation was one factor that prompted the start of a federal criminal investigation. In March 2017, criminal misdemeanor charges of adulteration and misbranding under the Food Drug and Cosmetic Act were filed against Henry Rychlik, Jr., Wilbur-Ellis Company, Colin McAtee, and Diversified Ingredients, Inc. (Case No. 17-100NAB, D.E. 1 and 11). Jeff Jensen, then an attorney in private practice at Husch Blackwell, entered his appearance as counsel for Wilbur-Ellis Company. (D.E. 3.)

After these criminal charges were filed, the United States filed a motion to intervene in Case No. 14-00859 for the limited purpose of staying discovery. (D.E. 1252 and 1253, Case No.

14-00859). On March 9, 2017, District Judge Sippel granted the motions and entered an order staying discovery. (D.E. 1259.)

In October 2017, Jeff Jensen became the Presidentially appointed, Senate-confirmed United States Attorney for the Eastern District of Missouri. Jeff Jensen's appointment as the EDMO USA raised two conflict of interest issues.

First, Jensen could no longer represent Wilbur-Ellis Company. His withdrawal as counsel for Wilbur-Ellis began on October 3, 2017, when a motion was filed in Case No. 17-100NAB to substitute Catherine Hanaway for Jeff Jensen as counsel for Wilbur-Ellis Company (D.E. 58). The motion was granted by the court on October 4, 2017, and thereafter Jensen was no longer the attorney of record for Wilbur-Ellis. (D.E. 59).

Second, after Jensen became the EDMO USA, there was a question about whether and in what manner the EDMO USAO he was now in charge of would/should be recused from further prosecution of the criminal cases where Jensen's former client, Wilbur-Ellis Company, and others were named as defendants.

Under long-standing procedures and protocols for dealing with such situations, the Department of Justice in Washington, D.C. took responsibility for undertaking this recusal analysis. On November 2, 2017, Associate Deputy Attorney General Scott Schools approved the recusal of the United States Attorney's office for the Eastern District of Missouri from the investigation and prosecution of *United States v. Custom Ag. Commodities, et al.*¹ and all related litigation. In a detailed memo (Attachment 1), the notice of recusal assigned supervision of the investigation and prosecution of the matter to the Western District of Missouri, and directed and

¹ 'Custom Ag Commodities, et al.' was the designation given to the original U.S. Attorney's Office internal file. The related litigation under this umbrella includes *U.S. v. Rychlik, et al.* (17-CR-00100), *U.S. v. Haning* (18-CR-00139), and *U.S. v. McKinney* (18-CR-00414).

authorized then Acting United States Attorney Thomas M. Larson or his successor to “conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters.”

The assignment to the WDMO USAO also authorized specified Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on the matter under the supervision and direction of the WDMO USAO, to include EDMO AUSAs Charles Birmingham, Gil Sison, and Kyle Bateman, as well as EDMO legal assistants Patricia Rockers and Julie Hurst, and EDMO IT Specialist Beau Toth.

On November 14, 15, and 16, 2017, EDMO AUSAs Charles S. Birmingham, Gilbert C. Sison, and Kyle Bateman were appointed Special Attorneys to the United States Attorney General (hereafter “Special Attorneys”) pursuant to 28 U.S.C. § 515. (Attachments 2-4) On November 14, 2017, WDMO AUSA Kathleen Mahoney was appointed to the same position. (Attachment 5)

On December 1, 2017, in Case No. 17-CR-00100, Charles Birmingham and Gilbert Sison accordingly filed an amended entry of appearance, as Special Attorneys. (D.E. 62.)

On December 5, 2017, in case number 17-CR-00100, defendant Diversified Ingredients, Inc. filed an objection to Mr. Birmingham’s entry of appearance. (D.E. 65.) The United States filed a response in opposition to that objection. (D.E. 67.) On February 12, 2018, defendant Diversified Ingredients withdrew its objection to the entry of appearance. (D.E. 80.). On July 6, 2018, Kyle Bateman entered his appearance in Case No. 17-CR-00100 as a Special Attorney. (D.E. 106.)

All four defendants in case number 17-CR-00100 have pled guilty pursuant to plea agreements (D.E. 86, 93, 110, 123) and, without objection, one or more of the designated

Special Attorneys, i.e., Charles Birmingham, Gilbert Sison, and Kyle Bateman, signed the plea agreements on behalf of the Government. (D.E. 87, 94, 112, 124.)

Thomas Larson was the Acting United States Attorney for the Western District of Missouri at the time of the recusal in November 2017. Thereafter, Timothy A. Garrison became the Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. To be clear, Mr. Garrison began serving as the Interim USA on January 5, 2018, and on April 26, 2018, the interim designation was removed following his confirmation by the United States Senate.² The November 2017 recusal specifically authorizes Acting United States Attorney Thomas Larson or his successor to exercise full authority in any aspect of the recusal matter.

In summary, since November 2, 2017, the United States Attorney's Office for the Western District of Missouri has been responsible for pursuing all "related matters" arising from the facts of the Nestle/Blue Buffalo civil litigation, one of which is this recusal case, *United States v. Haning*, whose procedural history is set forth below.

On February 14, 2018, a grand jury sitting in the Eastern District of Missouri returned an indictment in the instant case charging Haning with thirty-one counts, including one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 and thirty counts of wire fraud in violation of 18 U.S.C. § 1343, based on the alleged misbranding and adulteration of pet food

² On January 4, 2018, Attorney General Jeff Sessions appointed Timothy A. Garrison as Interim United States Attorney for the Western District of Missouri. While Garrison was serving as the Interim United States Attorney, President Donald J. Trump on February 20, 2018, submitted to the United States Senate Garrison's nomination to serve as the Presidentially-appointed Western District of Missouri United States Attorney. On April 26, 2018, the United States Senate unanimously confirmed Garrison's nomination to serve as the Western District of Missouri United States Attorney. Senior Eighth Circuit Judge Duane Benton thereafter administered the oath of office to Garrison and he began serving as the Presidentially-appointed, Senate-confirmed United States Attorney for the Western District of Missouri. In summary, it is beyond dispute that the Western District of Missouri has had a lawfully appointed United States Attorney in place at all times relevant to the pending defense motion.

manufactured and/or sold by and through American By-Products, Diversified Ingredients, Inc., Wilbur Ellis Company, Custom AG Commodities, LLC, and multiple pet food manufacturers and companies. Case No. 18-00139RWS, D.E. 1 and 2. The indictment was signed by Gilbert C. Sison, in his capacity as a Special Attorney, acting under the direct supervision of the United States Attorney for the Western District of Missouri. Birmingham, Sison, and Bateman all subsequently entered their appearance in this case as Special Attorneys. Case No. 18-CR-00139, D.E. 4 and 8.

Even though all the facts stated above were matters of public record, and therefore known to Haning and his attorneys since the return of the February 2018 indictment, it was not until nine months later, on November 13, 2018, that Haning moved to disqualify the attorneys on the prosecution team assigned to this case (D.E. 72). Between the return of the February 2018 indictment and the filing of the pending motion to disqualify on November 13, 2018, Haning filed a motion to change venue (D.E. 18), a motion for a court order releasing *lis pendens* (D.E. 32), and multiple motions for permission to travel (D.E. 24, 41, and 62). Nowhere in any of these prior motions did Haning assert that the prosecution team consisting of federal prosecutors Birmingham, Sison, and Bateman (as Special Attorneys under the direct supervision of the WDMO USAO) was not ethically permitted to respond to his motions. Nor did Haning raise any objections about the ethical composition of the prosecution team after the Government filed responses in opposition to his venue and *lis pendens* motions, nor after the Government did not oppose his travel motions.

On November 7, 2018, Attorney General Jefferson B. Sessions resigned from office and, on the same date, President Donald J. Trump appointed Sessions' Chief of Staff, Matthew G. Whitaker, to serve temporarily as Acting Attorney General under the Federal Vacancies Reform Act (FVRA). The appointment of Whitaker as the Acting Attorney General is the precipitating event for the filing of the motion to dismiss. However, as explained below, Whitaker's

November 2018 appointment as the Acting Attorney General (a) does not provide a basis for dismissal of the indictment which has been pending against Haning since February 2018, and (b) is irrelevant to the question of whether attorneys designated as Special Attorneys since November 2017 may serve, and continue to serve, as attorneys on the team assigned to this prosecution.

Arguments and Authorities

The President's designation of the Acting Attorney General was valid, but the Court need not address the designation's validity in this case. That is because the legal authority of the Department of Justice to prosecute this case does not depend in any way on whether a vacancy in the office of Attorney General has been properly filled. The prosecution is being supervised by a United States Attorney pursuant to statutory authority, and the United States Attorney is supervised by the Senate-confirmed Deputy Attorney General. In any event, the alleged invalidity of the Acting Attorney General's designation does not justify dismissal of the indictment.

A. The President's Temporary Designation of Mr. Whitaker as the Acting Attorney General was Valid as both a Statutory and a Constitutional Matter

The Department of Justice's Office of Legal Counsel has determined that the President lawfully designated Mr. Whitaker as the Acting Attorney General pursuant to 5 U.S.C. § 3345(a)(3) and that Mr. Whitaker's appointment was constitutional. *See* Office of Legal Counsel, *Designating an Acting Attorney General* (Nov. 14, 2018), available at <https://www.justice.gov/olc/file/1112251/download>. Following the outline of that memo, we discuss below the statutory justification for the appointment of the Acting Attorney General and then the constitutional propriety of said appointment.

1. The Federal Vacancies Reform Act (FVRA)

Under the FVRA when a presidentially appointed, Senate-confirmed officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office,” the “first assistant” to that office by default “shall perform the functions and duties of the office temporarily in an acting capacity.” 5 U.S.C. § 3345(a)(1). However, the FVRA also authorizes the President to override that default rule. As relevant here, “the President (and only the President) may direct an officer or employee” of the agency in which the vacancy occurs “to perform the functions and duties of the vacant office temporarily in an acting capacity,” as long as the officer or employee served in the agency for at least 90 of the 365 days preceding the vacancy and is paid at least at the GS-15 level. 5 U.S.C. § 3345(a)(3). An individual whom the President designates under that provision may serve in an acting capacity subject to the time limitations of 5 U.S.C. § 3346.

The President invoked 5 U.S.C. § 3345(a)(3) to designate Mr. Whitaker as the Acting Attorney General following former Attorney General Sessions’ resignation from office. *See* OLC Memorandum 1. At the time, Mr. Whitaker had been serving in the Department as Chief of Staff and Senior Counselor to the Attorney General, and he met the statutory requirements of having served in the Department of Justice for at least 90 days prior to the vacancy at a rate of pay of GS-15 or higher. *See id.* at 5. Defendant does not contend otherwise. Accordingly, Mr. Whitaker’s appointment as Acting Attorney General satisfied the plain terms of Section 3345(a)(3).

A separate statute, 28 U.S.C. § 508, establishes a line of succession for the Attorney General, but it is not the exclusive means for addressing such a vacancy, for reasons the Department’s Office of Legal Counsel has explained at length. *See* OLC Memorandum 5-8; *see also Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 209-210 (2007). Section 508(a) states that “[i]n case of a vacancy in the office of Attorney General, or of

his absence or disability, the Deputy Attorney General may exercise all the duties of that office.” Section 508(a) also specifies that “for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.” On its face, the statute does not purport to be the exclusive means of addressing a vacancy in the office of the Attorney General, and indeed the reference to the first section of the FVRA (“section 3345 of title 5”) in Section 508(a) itself confirms the opposite.

Nor does the FVRA itself make 28 U.S.C. § 508 exclusive. The relevant provision, entitled “Exclusivity,” states that “Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [presidentially appointed, Senate-confirmed] office of an Executive agency,” unless another statute “expressly . . . designate[s] an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity.” 5 U.S.C. § 3347(a)(1)(B). Section 508(a) is a statute that “designate[s] an officer or employee to perform the functions and duties of a specified office” within the meaning of that provision. *See* 31 Op. O.L.C. at 208. But by the plain terms of the FVRA, the existence of such an agency-specific succession statute means only that the FVRA is not “*exclusive*,” not that the FVRA is therefore rendered unavailable or inapplicable. 5 U.S.C. § 3347(a) (emphasis added). When an agency-specific statute, such as Section 508(a), provides a default rule for succession in office, 5 U.S.C. § 3347 ensures that the President may either allow that default rule to operate or may invoke the FVRA to designate an alternate acting officer. A contrary reading would invert the meaning of the FVRA’s exclusivity provision, transforming it from a rule about when the FVRA is exclusive of other statutes into one about when other statutes are exclusive of the FVRA.

The structure of the FVRA confirms that 5 U.S.C. § 3347 does not render the FVRA inapplicable in the face of an agency-specific vacancy statute, including 28 U.S.C. § 508. Congress addressed the inapplicability of the FVRA elsewhere in the statute. Section 3345 applies in general to vacancies in an “Executive agency.” 5 U.S.C. § 3345(a); *see also* 5 U.S.C. § 105 (defining “Executive agency” to include any “Executive department,” such as the Department of Justice). In a separate provision, entitled “Exclusion of certain officers,” Congress qualified the scope of the statute by providing that “Section[] 3345 . . . shall not apply” to certain specified officers in certain specified agencies. 5 U.S.C. § 3349c. The Attorney General is not among the officers excluded from coverage under the FVRA by Section 3349c. *See ibid.*

By contrast, the vacancy statute that preceded the FVRA contained a provision authorizing the President to designate a presidentially appointed, Senate-confirmed officer to perform the duties of a vacant office in some circumstances, but that provision expressly did “not apply to a vacancy in the office of Attorney General.” 5 U.S.C. § 3347 (1994). Indeed, similar provisions can be traced to the 1870s. *See, e.g.,* Rev. Stat. § 179 (1st ed. 1875), 18 Stat. 1, 27. But in the FVRA, Congress omitted—and therefore eliminated—the prior limitation. *See* OLC Memorandum 7; *see also, e.g.,* *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (giving effect to Congress’s purposeful omission of prior statutory language); *Brewster v. Gage*, 280 U.S. 327, 337 (1930) (noting that “[t]he deliberate selection of language so differing from that used in earlier acts indicates that a change of law was intended”).

In light of the FVRA’s text and structure, it is unsurprising that the only court of appeals to address the question has concluded that office-specific vacancy statutes do not displace the President’s FVRA authority. In *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550 (9th Cir. 2016), the court of appeals rejected the argument that the FVRA was inapplicable where

an agency-specific statute “expressly provide[d] a means for filling” the vacancy in question. *Id.* at 556 (discussing 29 U.S.C. § 153(d)). The court concluded that “the text of the respective statutes” “belied” any such argument. *Id.* at 555. The existence of an agency-specific statute, the court explained, means only that “neither the FVRA nor the [agency-specific statute] is the *exclusive* means of appointing” an acting officer, and “the President is permitted to elect between these two statutory alternatives.” *Id.* at 556; *see also English v. Trump*, 279 F. Supp. 3d 307, 323-24 (D.D.C. 2018) (reaching a similar conclusion with respect to the office of the Director of the Bureau of Consumer Financial Protection).

That conclusion is confirmed by the legislative history of the FVRA. A Senate Committee Report accompanying a bill that was the basis for the FVRA contained a list of then-existing, agency-specific statutes “that expressly authorize the President . . . to designate an officer to perform the functions and duties of a specified office temporarily in an acting capacity, as well as statutes that expressly provide for the temporary performance of the functions and duties of an office by a particular officer or employee.” S. Rep. No. 105-250, at 15 (1998). The Report stated that the bill would “retain[]” those statutes, *ibid.*, but that in those instances the “Vacancies Act would continue to provide an *alternative* procedure for temporarily occupying the office,” *id.* at 17 (emphasis added). This passage describing the two types of agency-specific statutes that the bill would retain -- those that expressly authorize the President to designate an officer to perform the functions and duties of the vacant office, and those (like 28 U.S.C. § 508) that expressly provide for the performance of those duties by a particular officer, *see* S. Rep. No. 105-250, at 15 -- directly corresponds to a provision in the Senate bill containing the language enacted as Subparagraphs (A) and (B) of 5 U.S.C. § 3347(a)(1). *See* S. Rep. No. 105-250, at 26 (proposed 5 U.S.C. § 3347(a)(2)(A) and (B)).

The drafting history further confirms that the FVRA remains available as an alternative means of addressing a vacancy in the office of the Attorney General. A provision in the bill as reported in the Senate would have provided that “[w]ith respect to the office of the Attorney General . . . the provisions of section 508 shall be applicable,” S. Rep. No. 105-250, at 25, which was intended to limit the President’s authority to designate a person to perform the duties of Attorney General via the FVRA, *see id.* at 13. But Congress omitted that limitation from the final version of the Act. The deletion of that limitation means that the office of Attorney General is within the category of offices for which the FVRA is an alternative to the agency-specific statute. And indeed, 28 U.S.C. § 508 was included in the list of then-existing agency-specific statutes in the Senate Report. *See id.* at 16. “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted); *cf.* p. 5, *supra*.

2. The Appointments Clause of the Constitution

Mr. Whitaker’s designation to serve temporarily as Acting Attorney General conformed to the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. That Clause requires the President to appoint principal officers, “by and with the Advice and Consent of the Senate,” but permits Congress to vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” *Ibid.*; *see Lucia v. SEC*, 138 S. Ct. 2044, 2051 & n.3 (2018); *Edmond v. United States*, 520 U.S. 651, 660 (1997).

Although the Attorney General is surely a principal officer, the Appointments Clause does not require that an individual who merely acts temporarily as Attorney General must also be appointed in the manner of a principal officer. To the contrary, both long-standing precedent of

the Supreme Court and historical practice demonstrate that “the temporary nature of acting service weighs against principal-officer status.” OLC Memorandum 10. In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a “subordinate officer” (there, a vice-consul) may be “charged with the performance of the duty of” a principal officer “for a limited time, and under special and temporary conditions,” without “thereby transform[ing] into” a principal officer, *id.* at 343. The Court therefore rejected an Appointments Clause challenge to a scheme in which the vice-consul, who was not appointed as a principal officer, temporarily functioned as an acting principal officer (consul-general) during a vacancy. *See id.* at 331-332, 339-340, 343-344.

Nor is *Eaton* exceptional. As the Court noted, the “practice of the government” for decades before that case confirmed the shared understanding of both the Legislative and Executive Branches that a non-Senate-confirmed officer may serve temporarily as an acting principal officer without violating the Appointments Clause. 169 U.S. at 344 (citation omitted); *see* OLC Memorandum at 10-18 (collecting historical evidence dating to 1792 and spanning more than 160 individual instances, including examples of non-Senate-confirmed officers serving as Acting Secretary of State, Acting Secretary of the Treasury, Acting Secretary of War, and Acting Attorney General); *cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (noting that “historical practice” is entitled to “significant weight” in addressing the separation of powers) (emphasis omitted). Given the “limited” and “temporary” nature of his duties, *Eaton*, 169 U.S. at 343, an Acting Attorney General is not a principal officer for purposes of the Appointments Clause. Congress has permissibly vested the authority to select non-Senate-confirmed officials to be Acting Attorney General (or many other acting officers) in the President alone. By doing that in the FVRA, it has simply restored a power that it had repeatedly granted to the President with respect to the heads of

executive departments in multiple statutes between 1792 and 1868. *See* OLC Memorandum 11-12.

Eaton’s holding is not limited to periods of exigency. In *Eaton* itself, the Supreme Court stated that Congress’s “manifest purpose” in distinguishing between consuls and vice-consuls was to “limit the period of duty to be performed by the vice-consuls, and thereby to deprive them of the character of ‘consuls,’ in the broader and more permanent sense of that word.” 169 U.S. at 343. Thus, the “special and temporary conditions” recognized in *Eaton* were not the particular exigency associated with the facts of that case, but the limits of the then-existent regulatory scheme, which permitted service in any case of “the absence or the temporary inability of the consul,” whatever the cause. *Id.* at 342; *see also id.* at 341.

Moreover, the Court has consistently described *Eaton* as turning on the temporary nature of the service, not on any particular exigency. In *Edmond*, for example, the Court explained *Eaton* as finding that “a vice consul charged temporarily with the duties of the consul” is an inferior officer, 520 U.S. at 661, with no mention of any emergency circumstances. Likewise, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court described *Eaton* as approving of the practice of appointing acting vice-consuls “during the temporary absence of the consul,” *id.* at 672, again without reference to any emergency other than the vacancy itself. *See also id.* at 721 (Scalia, J., dissenting) (noting that *Eaton* “held that the appointment . . . of a ‘vice-consul,’ charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause”); *cf. Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 708 n.17 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Eaton* for the proposition that “[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation”), *aff’d in part and rev’d in part*, 561 U.S. 447 (2010).

Nor is *Eaton* distinguishable because it concerned “consular officers” abroad. The decision was not reasoned on those terms. Instead, the Court explained that a contrary decision would “render void *any and every* delegation of power to an inferior to perform *under any circumstances* or exigency.” *Eaton*, 169 U.S. at 343 (emphases added). Indeed, the Appointments Clause applies equally to “public Ministers and Consuls . . . and all other Officers of the United States.” U.S. Const. art. II, § 2, cl. 2. There is not one constitutional rule for consuls and vice-consuls and another for domestic officers, but rather a single Appointments Clause that has long been understood to permit the President to make a temporary acting designation like the one at issue here.

In support of his position that Associate Attorney General Whitaker’s appointment is illegal and unconstitutional, Haning cites *NLRB v. SW General, Inc.*, 137 S.Ct. 929 (2017). The Supreme Court in *NLRB* held that the Federal Vacancies Reform Act did not permit an acting general counsel of the NLRB to remain in that position once he was presidentially nominated for that position. *Id.* at 944.

Applying the holding of *NLRB* to the facts of this case, if President Trump were to nominate Acting Attorney General Whitaker to be the next Attorney General of the United States, Whitaker could not also continue to serve as the Acting Attorney General. Since that has not happened, the Supreme Court decision in *NLRB* is inapplicable here.

In summary, and for the reasons stated in the Office of Legal Counsel opinion, Haning is plainly incorrect in his assertion that the Acting Attorney General’s designation is invalid. If the Court reaches the issue, it should follow the reasoning set forth in the Office of Legal Counsel’s opinion. As explained below, however, the Court need not reach this issue.

B. Dismissal is Not Justified Even if the Designation of Whitaker as Acting Attorney General Was Invalid

Defendant Haning argues that the Acting Attorney General lacks constitutional authority to represent the United States and that his lack of authority flows to Special Attorneys to the United States Attorney General, meaning that the indictment must be dismissed. This argument reflects a misunderstanding of the basic constitutional and statutory concepts relevant to this motion.

The Appointments Clause requires the President, “with the Advice and Consent of the Senate,” to “appoint” all “Officers of the United States . . . which shall be established by law.” U.S. Const. art. II, § 2, cl. 2. This method is the default means of appointing all officers and the exclusive means of appointing *principal* officers. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 n.3 (2018). The Clause goes on to say, however, that Congress may vest the appointment of “inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, § 2, cl. 2.

Congress “established” the Attorney General as “the head of the Department of Justice.” 28 U.S.C. § 503. But Congress has also established the office of United States Attorney, directing the President to “appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.” 28 U.S.C. § 541(a). The United States Attorney has the statutory authority and responsibility to “prosecute for all offenses against the United States” occurring “within his district.” 28 U.S.C. § 547(1). Congress has also established the office of Deputy Attorney General, 28 U.S.C. § 504, and has authorized the Attorney General to delegate any of his functions to “any other officer, employee, or agency of the Department of Justice,” 28 U.S.C. § 510. Moreover, in this particular case, and while Attorney General Sessions was still serving as the Presidentially-appointed, Senate-confirmed Attorney General of the United States,

the United States Attorney for the Western District of Missouri was specifically appointed as his delegatee for purposes of this case and all matters related to it. (See Attachment 1, page 2). That delegation alone renders the defense motion meritless.

1. This prosecution is under the supervision of a validly appointed United States Attorney.

Although almost all of the functions of the Department of Justice and its officers are vested in the Attorney General, 28 U.S.C. 509, the Attorney General need not and in most cases does not exercise those functions himself. Nor does the authority of a United States Attorney to conduct litigation on behalf of the Department depend on any action by the Attorney General. By statute, Congress has expressly authorized each United States Attorney to, among other things, “prosecute for all offenses against the United States.” 28 U.S.C. 547. Thus, where a prosecution team is conducting a criminal prosecution under the direction and supervision of the U.S. Attorney, here the U.S. Attorney for the Western District of Missouri, Timothy A. Garrison, federal law expressly authorizes the conduct in that litigation, without the need for any separate authorization from the Attorney General. This means that the United States Attorney’s authority to conduct this prosecution does not depend on whether the Acting Attorney General has been validly assigned to his position by the President.

The United States Attorney for the Western District of Missouri, Timothy A. Garrison, supervises this prosecution and he was appointed by the President and confirmed by the Senate. That appointment fully complied with the Appointments Clause and Section 541(a). Because this prosecution is being supervised by a presidentially appointed and Senate-confirmed officer—the United States Attorney, who has statutory authority to prosecute, *see* 28 U.S.C. § 547(1)—there is no basis to dismiss the indictment.

2. The Defendant has provided no basis for concluding that the Acting Attorney General has had any personal participation in this prosecution.

Although an Attorney General may involve himself in particular cases handled by the Department, *see* 28 U.S.C. § 516, he is under no obligation to do so. Given the thousands of cases handled by the Department's litigating divisions and the offices of 93 U.S. Attorneys each year, it is not feasible for an Attorney General to participate personally in more than a small fraction of the Department's cases. This is especially true in criminal cases. The United States Sentencing Commission received reports of approximately 67,000 federal criminal cases in which the offender was sentenced in fiscal year 2017. *See* <https://www.ussc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2017>.

In order to establish any prejudice from the alleged defects in the Acting Attorney General's designation, the defendant would have to show that the Acting Attorney General has personally participated in this matter or otherwise personally affected its course and that the adverse actions were undertaken on his initiative or direction.

The fact that four prosecutors have participated in this case after being designated as Special Attorneys to the Attorney General pursuant to 28 U.S.C. § 515(b) does not mean they are being directly supervised by the Acting Attorney General. In fact, the Attorney General has delegated to the Deputy Attorney General the "appointment of special attorneys and special assistants to the Attorney General." 28 C.F.R. § 0.15(b)(1)(ii). And the Deputy Attorney General has authority to redelegate this authority to other officials. 28 C.F.R. § 0.15(c)(3). The Special Attorneys in this case were appointed by Scott Schools, who was an Associate Deputy Attorney General (See Attachment 1), and who reported to the Deputy Attorney General. The defendant has not shown that the Acting Attorney General has supervised the Special Attorneys involved in

this case. Mere speculation that the Acting Attorney General might take some action affecting this case is insufficient to warrant any relief, much less the drastic relief of dismissing the indictment.

3. The Acting Attorney General's indirect supervision over the case as the head of the Department of Justice does not support dismissal.

The Acting Attorney General's indirect involvement with this case as the acting head of the Department of Justice does not affect the validity of this prosecution. The defendant cannot support the sweeping claim that *every* officer within the Department of Justice would lack authority to prosecute criminal cases were the Acting Attorney General's designation invalid. Although the Attorney General is the "head of the Department of Justice," 28 U.S.C. § 503, the United States Attorneys and other Department officers are validly appointed officers of the United States in their own right and have statutory authority that is not contingent on the validity of the Attorney General's (or Acting Attorney General's) appointment. *See United States v. Hartwell*, 73 U.S. 385, 393 (1867) (once an officer is "appointed pursuant to law, [v]acating the office of his superior would not have affected the tenure of his place"). *Cf. Tenure of Office of Inspectors of Customs*, 2 Op. Atty. Gen. 410, 412 (1831) (office holders continue to hold office despite a vacancy or change in the person who exercised appointing authority). The 115,000-member Department of Justice is not a house of cards that falls whenever it is not headed by a Senate-confirmed officer.

The defendant's request to dismiss the indictment based on putative defects in the appointment of the Acting Attorney General also overlooks the independent role of the grand jury in this matter. The indictment was returned by the grand jury, which "is a constitutional fixture in its own right," *United States v. Williams*, 504 U.S. 36, 47 (1992) (quotation omitted), and "act[s] independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212,

218 (1960). “An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits.” *Costello v. United States*, 350 U.S. 359, 363 (1956). And any failures by the Executive Branch, including prosecutorial misconduct in front of the grand jury, provide a court “no authority to dismiss the indictment . . . absent a finding that [the defendant] w[as] prejudiced by such misconduct.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 263 (1988).

The Acting Attorney General’s allegedly invalid designation does not affect the indictment’s validity. As an initial matter, the indictment was returned in February 2018, nine months before the Acting Attorney General’s appointment. The defendant cannot show any error or prejudice where the prosecutor before the grand jury was supervised by a validly appointed United States Attorney. *See United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 2006) (participation of statutorily unauthorized Special Assistant U.S. Attorney in grand jury proceedings was harmless error where he was supervised by authorized Assistant U.S. Attorneys); *United States v. Vance*, 256 F.2d 82, 83 (6th Cir. 1958) (per curiam) (even if indictment had to be signed by U.S. Attorney, signature by AUSA is a harmless error).

4. The validity of the Acting Attorney General’s designation does not affect this Court’s jurisdiction

This Court has jurisdiction over this case regardless of the lawfulness of the Acting Attorney General’s appointment. The Court has jurisdiction under 18 U.S.C. § 3231 over “all offenses against the laws of the United States” within the district. The Acting Attorney General’s allegedly invalid designation does not strip the Court of jurisdiction. *See United State v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990) (where a Special Assistant U.S. Attorney’s appointment was statutorily invalid, his “unauthorized appearance on behalf of the government did not deprive the

district court of jurisdiction over the proceedings”); *Home New Publishing Co. v. United States*, 329 F.2d 191, 193 (5th Cir. 1964) (participation of statutorily unqualified government counsel did not deprive court of jurisdiction where the case was supervised by an Assistant United States Attorney).

C. There is no Basis to Disqualify the Prosecution Team

Defendant Haning argues the Department of Justice attempted to circumvent U.S. Attorney Jeff Jensen’s recusal “by giving three AUSA’s (sic) the title ‘Special Attorney to the United States Attorney General’ for the limited purpose of this prosecution.” (D.E. 72 at 1.) However, even though this indictment has been pending for nine months, Haning did not challenge until now either the validity of the indictment or the status of the three EDMO prosecutors assigned to this case, who are supervised by the United States Attorney for the Western District of Missouri, Timothy A. Garrison, and his designees. In seeking to disqualify Birmingham, Sison, and Bateman, defendant Haning asks this court to disqualify three attorneys who have no conflict of interest and who are being supervised in this case by attorneys who have no conflict of interest. Moreover, Haning cites no impropriety by the prosecution team or its supervising attorneys, no facts or evidence supporting a need for disqualification, no violation of any rule by the prosecution team, in fact, nothing at all that would justify disqualifying the entire prosecution team, an action that would raise serious separation of powers concerns and likely would be reversible error.

The overwhelming weight of authority counsels against disqualification of an entire U.S. Attorney’s Office. “[E]very circuit court that has considered the disqualification of an entire United States Attorney’s office has reversed the disqualification.” *United States v. Bolden*, 353 F.3d 870, 879 (10th Cir. 2003)(internal citations and quotation omitted); *see also United States v. Hasarafally*, 529 F.3d 125, 128 (2d Cir.2008) (“While a private

attorney's conflict of interest may require disqualification of that attorney's law firm in certain cases, such an approach is not favored when it comes to the office of a United States Attorney, or, *a fortiori*, to the Department of Justice as a whole.") (internal citations omitted); *Cope v. United States*, 272 Fed.Appx. 445, 449 (6th Cir.2008) (rejecting ineffective assistance of counsel claim for failure to move to recuse prosecutor's office after murder threat against prosecutor, explaining that "[d]isqualifying an entire United States Attorney's office is almost always reversible error, regardless of the underlying merits of the case") (quoting *Bolden*, 353 F.3d at 876). This strongly counsels against disqualification in this case.

United States v. Basciano, 763 F.Supp2d 303, 313-14 (E.D.N.Y. 2011).

The Department of Justice, through a careful and practical arrangement, has insured that no one assigned to the prosecution of this case, and others related to it, has either an actual conflict of interest, or the appearance of a conflict of interest, that would ethically preclude them from participating as members of the prosecution team. By divesting EDMO USA Jensen of any authority to act in this case and others related to it, all concerns related to his actual conflict of interest – based on his former representation of Wilbur-Ellis – have been addressed fully. By installing a conflict-free supervisory structure over the actual members of the prosecution team, all concerns related to the appearance of a conflict of interest also have been addressed fully. No member of the prosecution team, i.e., the United States Attorney for the Western District of Missouri, the attorneys and staff in the Western District of Missouri that work for the United States Attorney in the Western District of Missouri, and certainly none of the persons appointed as Special Attorneys, has either an actual conflict of interest or the appearance of one.

Haning argues there is no precedent for the type of conflict-free supervisory structure installed in this case. This assertion completely overlooks at least one such precedent, and one that would not have been difficult for Haning to identify because the precedent occurred within a

fairly recent and highly publicized prosecution in this district. *United States v. Martin Sigillito*, Case No. 11-CR-00168-LRR.

In the *Sigillito* case, the EDMO USAO was recused and the WDMO USAO was assigned responsibility for prosecuting the case. All members of the prosecution team were appointed as Special Attorneys and were directly supervised by the WDMO USA and/or her designees. One member of the prosecution team was WDMO AUSA Jess Michaelson, serving in his capacity as a Special Attorney. Two other members of the prosecution team were EDMO AUSAs Steven Holtshouser and Richard Finneran, also serving as Special Attorneys. To be clear, the exact same recusal protocol used in this case also was implemented in the *Sigillito* case.

The propriety of the appointment of Holtshouser and Finneran as Special Attorneys was raised and litigated in the *Sigillito* case. The District Court and the Court of Appeals upheld the arrangement. *See* Case No. 11-CR-00168-LRR, D.E. 436, 438, 475. *See also United States v. Sigillito*, 759 F.3d 913, 927-929 (8th Cir. 2014). Defendant Sigillito attempted to relitigate the appointment of Special Attorneys in a collateral proceeding under 18 U.S.C. § 2255. *See Sigillito v. United States*, Case No. 16-CV-00030-LRR. The district court denied the § 2255 motion and denied a certificate of appealability. (D.E. 6). The Eighth Circuit denied Sigillito's application for a certificate of appealability, and dismissed the appeal of the denial of his § 2255 motion. (D.E. 15)

In summary, just as the District Court and Eighth Circuit found that Sigillito had failed to demonstrate the presence of any actual conflict of interest, or appearance of such, on the part of Holtshouser and Finneran, this Court can and should find that Haning has failed to demonstrate the presence of any actual conflict of interest, or the appearance of such, on the part of Birmingham, Sison, and Bateman. The defense disqualification motion squarely invites the court

to override a conflict of interest process and protocol reserved for executive branch decision-making, and which received recent judicial approval in a prior similar context. This court should follow the precedent set in the *Sigillito* case and decline to accept such an improvident invitation from defendant Haning.

WHEREFORE, the Government respectfully requests that this Court deny Defendant's Motion to Dismiss, deny Defendant's alternative request to disqualify lawfully appointed Special Attorneys from representing the United States in this or any other related case, and grant such other and further relief in favor of the United States as the Court finds just and proper in this case.

Respectfully submitted,

MATTHEW G. WHITAKER
Acting United States Attorney General

TIMOTHY A. GARRISON
United States Attorney
Western District of Missouri

PHILLIP EUGENE PORTER
Criminal Division Chief
Western District of Missouri

/s/ Kathleen D. Mahoney
KATHLEEN D. MAHONEY #38828MO
Special Attorney to the Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2018, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Kathleen D. Mahoney
Kathleen D. Mahoney #38828MO
Special Attorney to the Attorney General

Porter, Gene (USAMOW)

From: Pena, Jaime (USAEO)
Sent: Thursday, November 02, 2017 12:44 PM
To: Jensen, Jeff (USAMOE); Costantin, Carrie (USAMOE); Larson, Tom (USAMOW); Porter, Gene (USAMOW); Becker, Tiffany (USAMOE); Walsh, Cari (USAMOW); Livingston, Gary (USAMOE); Rodriguez, Christy (USAMOW)
Cc: Schools, Scott (ODAG) (JMD); Wilkinson, Monty (USAEO); Bell, Suzanne L. (USAEO); Macklin, Jay (USAEO); Shea, Carol (USAEO)
Subject: FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

MEMORANDUM FOR:

Jeffrey B. Jensen
United States Attorney
Eastern District of Missouri

Carrie Costantin
First Assistant United States Attorney
Eastern District of Missouri

Thomas Larson
Acting United States Attorney
Western District of Missouri

Gene Porter
Criminal Chief
Western District of Missouri

THROUGH: Scott Schools
Associate Deputy Attorney General
Office of the Deputy Attorney General

Jay Macklin
General Counsel
Executive Office for United States Attorneys

FROM: Jaime Pena
Assistant United States Attorney
Executive Office for United States Attorneys

RE: Office-Wide Recusal of the Eastern District of Missouri from the investigation and prosecution involving *United States v. Custom Ag. Commodities, et al.* and related matters
(GCO File No. REC-18-413)

THIS IS FORMAL NOTICE that Scott Schools, Associate Deputy Attorney General (ADAG) has approved the recusal of the entire United States Attorney's Office for the Eastern District of Missouri from the case, including the investigation and prosecution, of *United States v. Custom Ag. Commodities, et al.* and related matters. The ADAG authorized this recusal in accordance with United States Attorneys' Manual (USAM) 3-2.170 and United States Attorneys' Procedures (USAP) 3-2.170.001 based upon existing conflicts of interest or the appearance of conflicts of interest pertaining to the matter.

ADAG Schools has assigned this matter to the Western District of Missouri and, pursuant to 28 U.S.C. § 515(a), has directed and authorized Acting United States Attorney Thomas Larson or his successor to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before magistrate judges, which the United States Attorney for the Eastern District of Missouri is authorized by law to conduct regarding this matter, and related matters. *See* USAP 3-2.170.001(6)(C)(2)(b) The ADAG has authorized the following Assistant United States Attorneys and personnel from the Eastern District of Missouri to continue working on this matter under the direction of the Western District of Missouri:

AUSA Charles Birmingham
 AUSA Gil Sison
 Forfeiture AUSA Kyle Bateman
 IT Specialist-Litigation Beau Toth
 Legal Assistant Patricia Rockers
 Legal Assistant Julie Hurst

Each office should communicate directly with the other concerning transfer of information related to this matter in accordance with the procedures outlined in USAP 3-2.170.001(6)(C)(2)(b)(3). The point of contact for the Western District of Missouri is Criminal Division Chief Gene Porter, who can be reached at (816) 426-3122, and the point of contact for the Eastern District of Missouri is First Assistant United States Attorney Carrie Costantin, who can be reached at (314) 539-2200.

All Assistant United States Attorneys subsequently assigned to this matter must be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. *See* USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b). Please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointment.

In accordance with USAP 3-2.170.001(6)(C)(2)(b)(3), any Special Attorney assigned the matter or case should sign any pleadings or documents using the signature block of the Western District of Missouri, with the addition of the Attorney General's name preceding that of the United States Attorney.

In the event that the Western District of Missouri wants to use AUSAs from the Eastern District of Missouri to assist it in this matter(s), it must submit a request to General Counsel's Office, EOUSA, that includes (1) a detailed justification of the need for the use of an AUSA, and (2) a detailed statement of the role the AUSA would play. ADAG Schools retains the authority to approve/disapprove any such request.

Porter, Gene (USAMOW)

From: Porter, Gene (USAMOW)
Sent: Thursday, November 02, 2017 4:40 PM
To: Larson, Tom (USAMOW); Ketchmark, David (USAMOW); Mahoney, Kate (USAMOW)
Cc: Rodriguez, Christy (USAMOW); Wright, Sherri (USAMOW); Miles, Megan (USAMOW); Costantin, Carrie (USAMOE); Birmingham, Charles (USAMOE); Sison, Gilbert (USAMOE); Bateman, Kyle (USAMOE)
Subject: FW: FORMAL NOTICE: Office-wide Recusal of the Eastern District of Missouri (REC-18-413)

Please see the notice below for a new recusal case assigned to WDMO.

WDMO will provide a supervisory chain of command so the three EDMO AUSAs listed below (Charles Birmingham, Gil Sison, and Kyle Bateman – who are excluded from the recusal that otherwise affects all other lawyers in the EDMO USAO) can continue to be the line prosecutors working this case. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Per the terms of the recusal notice, all three of the EDMO AUSAs need to be appointed as Special Attorneys in order to appear on behalf of the government in the Eastern District of Missouri. *See* USAM 3-2.300 and USAP 3-2.170.001(6)(C)(2)(b).

WDMO AUSA Kate Mahoney, the Chief of the Fraud and Public Corruption Unit in WDMO, will be the first line supervisor of the three EDMO line attorneys. Accordingly, she too needs to be appointed as a Special Attorney in the same manner as the three EDMO AUSAs.

Rosie – would you please contact Nicole West, EOUSA Personnel Staff, Operations Division, at (202) 252-5325, to obtain the appointments for all four AUSAs – WDMO AUSA Kate Mahoney as well as the three EDMO AUSAs.

[REDACTED]

[REDACTED]

Will keep Tom informed on all significant developments as they arise in the recusal case.

Let me know if you have any questions.

Gene

Gene Porter | Criminal Division Chief | United States Attorney's Office | Western District of Missouri | 400 East 9th St, Suite 5510, Kansas City, MO 64106 | ☎: (816) 426-3122 | 📠: (816) 426-4210 | ✉: Gene.Porter@usdoj.gov



U.S. Department of Justice

RECEIVED

Executive Office for United States Attorneys

NOV 14 2017

Human Resources Staff

U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

Suite 8017, Bicentennial Building
600 E Street, NW
Washington, DC 20530

(202) 252-5300
FAX (202) 252-5301

November 14, 2017

Mr. Charles S. Birmingham
Assistant United States Attorney
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102

Dear Mr. Birmingham:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and

5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

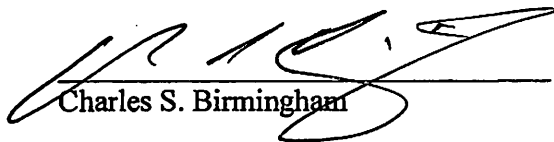
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy
Assistant Director
Human Resources Staff
Operations Division

The foregoing terms and conditions
are hereby agreed to and accepted:



Charles S. Birmingham

APPOINTMENT AFFIDAVITS

SPECIAL ATTORNEY

(Position to which Appointed)

NOVEMBER 14, 2017

(Date Appointed)

DOJ

(Department or Agency)

WDMO

(Bureau or Division)

STL, MO

(Place of Employment)

I, CHARLES S. BIRMINGHAM, do solemnly swear (or affirm) that--

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14th day of November, 2017

at St. Louis Missouri
(City) (State)



JULIA MARIE HURST
My Commission Expires
May 18, 2021
St. Louis City
Commission #13690947

Commission expires 5-15-2021
(If by a Notary Public, the date of his/her Commission should be shown)

(Signature of Officer)

(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

STATEMENT OF APPOINTMENT CONDITIONS

I, CHARLES S. BIRMINGHAM, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 515 as a Special Attorney for the District of WDMO to assist with: US v. Customs Ag Commodities, et al and will report and act under the direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I agree to sign a Grand Jury confidentiality statement, as appropriate.

Signature: _____

A handwritten signature in blue ink, appearing to be 'CS Birmingham', written over a horizontal line.

Date: _____

November 14, 2017



RECEIVED

NOV 16 2017

U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

Human Resources Staff

U.S. Department of Justice

Executive Office for United States Attorneys

Suite 8017, Bicentennial Building
600 E Street, NW
Washington, DC 20530

(202) 252-5300
FAX (202) 252-5301

November 15, 2017

Mr. Gilbert C. Sison
Assistant United States Attorney
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102

Dear Mr. Sison:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegate, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

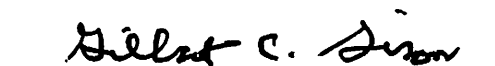
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy
Assistant Director
Human Resources Staff
Operations Division

The foregoing terms and conditions
are hereby agreed to and accepted:


Gilbert C. Sison

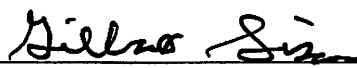
STATEMENT OF APPOINTMENT CONDITIONS

I, Gilbert Sison, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction
of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:


Gilbert Sison

Date:

November 16, 2017

APPOINTMENT AFFIDAVITS

Special Attorney
(Position to which Appointed)

11/15/2017
(Date Appointed)

Department of Justice
(Department or Agency)

USAO - WDMO
(Bureau or Division)

St. Louis, Missouri
(Place of Employment)

I, Gilbert Sison, do solemnly swear (or affirm) that--

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

Gilbert Sison
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis
(City)

Missouri
(State)



JULIA MARIE HURST
My Commission Expires
May 18, 2021
St. Louis City
Commission #13690947

Julia Marie Hurst
(Signature of Officer)

Commission expires 5-18-2021
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.



RECEIVED

NOV 16 2017

U.S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

U.S. Department of Justice

Executive Office for United States Attorneys

Human Resources Staff

Suite 8017, Bicentennial Building
600 E Street, NW
Washington, DC 20530

(202) 252-5300
FAX (202) 252-5301

November 15, 2017

Mr. Kyle T. Bateman
Assistant United States Attorney
Eastern District of Missouri
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 20.333
St. Louis, Missouri 63102

Dear Mr. Bateman:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct.

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 15, 2017, not to exceed November 14, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri.
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

Attachment 4

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

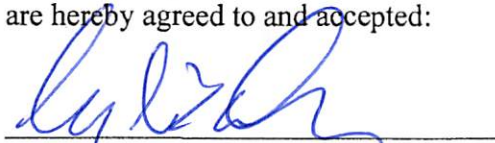
You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

Sincerely,



Valarie D. Mulcahy
Assistant Director
Human Resources Staff
Operations Division

The foregoing terms and conditions
are hereby agreed to and accepted:



Kyle T. Bateman

APPOINTMENT AFFIDAVITS

Special Attorney
(Position to which Appointed)

11/15/2017
(Date Appointed)

Department of Justice
(Department or Agency)

USAO - WDMO
(Bureau or Division)

St. Louis, Missouri
(Place of Employment)

I, Kyle Bateman, do solemnly swear (or affirm) that--

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

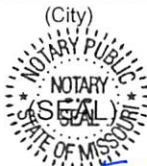
C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.


(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 16th day of November, 2017

at St. Louis Missouri
(City) (State)



JULIA MARIE HURST
My Commission Expires
May 18, 2021
St. Louis City
Commission #13690947


(Signature of Officer)

Commission expires 5-18-2021
(If by a Notary Public, the date of his/her Commission should be shown)


(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.

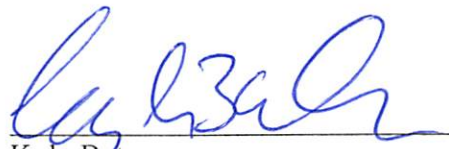
STATEMENT OF APPOINTMENT CONDITIONS

I, Kyle Bateman, hereby agree to the following as a condition to my appointment pursuant to 28 U.S.C. section 543 as a Special Assistant United States Attorney for the Western District of Missouri to assist with:

US. V. Customs Commodities, et al and will report and act under direction of the US AG or his delegee, the USA for the WDMO.

1. If I require access to restricted information involving a matter other than that to which I have been appointed, I shall request authorization from the United States Attorney.
2. I understand that the limitations of my access to the United States Attorney's Office is determined by the United States Attorney in that office.

Signature:


Kyle Bateman

Date:

November 16, 2017



U.S. Department of Justice

Executive Office for United States Attorneys

Human Resources Staff

*Suite 8017, Bicentennial Building
600 E Street, NW
Washington, DC 20530*

*(202) 252-5300
FAX (202) 252-5301*

November 14, 2017

Ms. Kathleen D. Mahoney
Assistant United States Attorney
Western District of Missouri
Charles E. Whittaker Courthouse
400 East 9th Street
Kansas City, Missouri 64106

Dear Ms. Mahoney:

You are hereby appointed as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515. Subject to the terms and conditions set forth below, you are authorized to file informations and to conduct in the Eastern District of Missouri any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates which United States Attorneys are authorized to conduct

This appointment is made subject to the following terms and conditions, with which we ask that you express your concurrence by signing this letter and returning it to me in the enclosed envelope:

1. This appointment is effective November 14, 2017, not to exceed November 13, 2019, unless extended;
2. With regard to all matters handled by you as a Special Attorney, you will report to and act under the direction of the United States Attorney General or his delegee, the United States Attorney for the Western District of Missouri;
3. During and after the term of your appointment, you will be subject to all laws, regulations and policies applicable to employees. These include, but are not limited to, the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 et seq., Federal conflict of interest statutes 18 U.S.C. §§ 207, 208, and 209; laws restricting the disclosure of certain confidential governmental information, 18 U.S.C. § 1905 and the Freedom of Information and Privacy Acts, 5 U.S.C. § 552 and § 522a; and political activity restrictions, 5 U.S.C. § 7321 et seq.;

4. You will serve without compensation other than that which you now receive as an employee of the Department of Justice; and
5. Your appointment may be terminated at any time without cause or notice.

Please execute the enclosed Appointment Affidavit which contains the oath of office and return it to Nicole West, SAUSA Program Assistant, Operations Division within fourteen (14) days. This appointment is effective upon the execution of the required oath of office.

You must file a copy of this letter with the Clerk of the District Court to evidence this appointment.

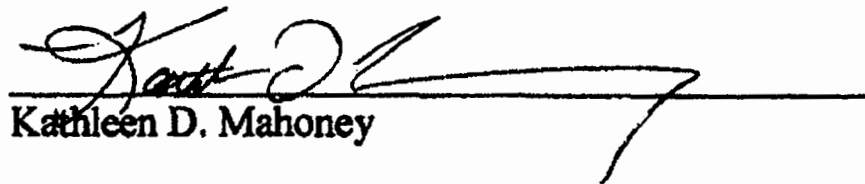
Sincerely,



Valarie D. Mulcahy
Assistant Director
Human Resources Staff
Operations Division

Enclosure

The foregoing terms and conditions
are hereby agreed to and accepted:


Kathleen D. Mahoney

APPOINTMENT AFFIDAVITS

Special Attorney

(Position to which Appointed)

11/14/2017

(Date Appointed)

Department of Justice

(Department or Agency)

U. S. Attorney's Office

(Bureau or Division)

Eastern District of Missouri

(Place of Employment)

I, Kathleen D. Mahoney, do solemnly swear (or affirm) that--

A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

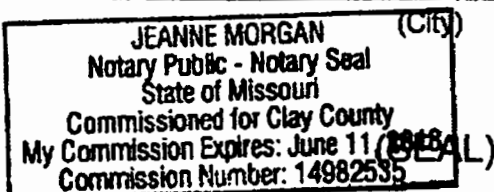

(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 14 day of November, 2017

at Kansas City

Missouri

(State)




(Signature of Officer)

Commission expires June 11, 2018

(If by a Notary Public, the date of his/her Commission should be shown)

Acting United States Attorney
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.